

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 18,737

JEROME CURTIS, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

On Appeal from a Verdict and Sentence of
United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

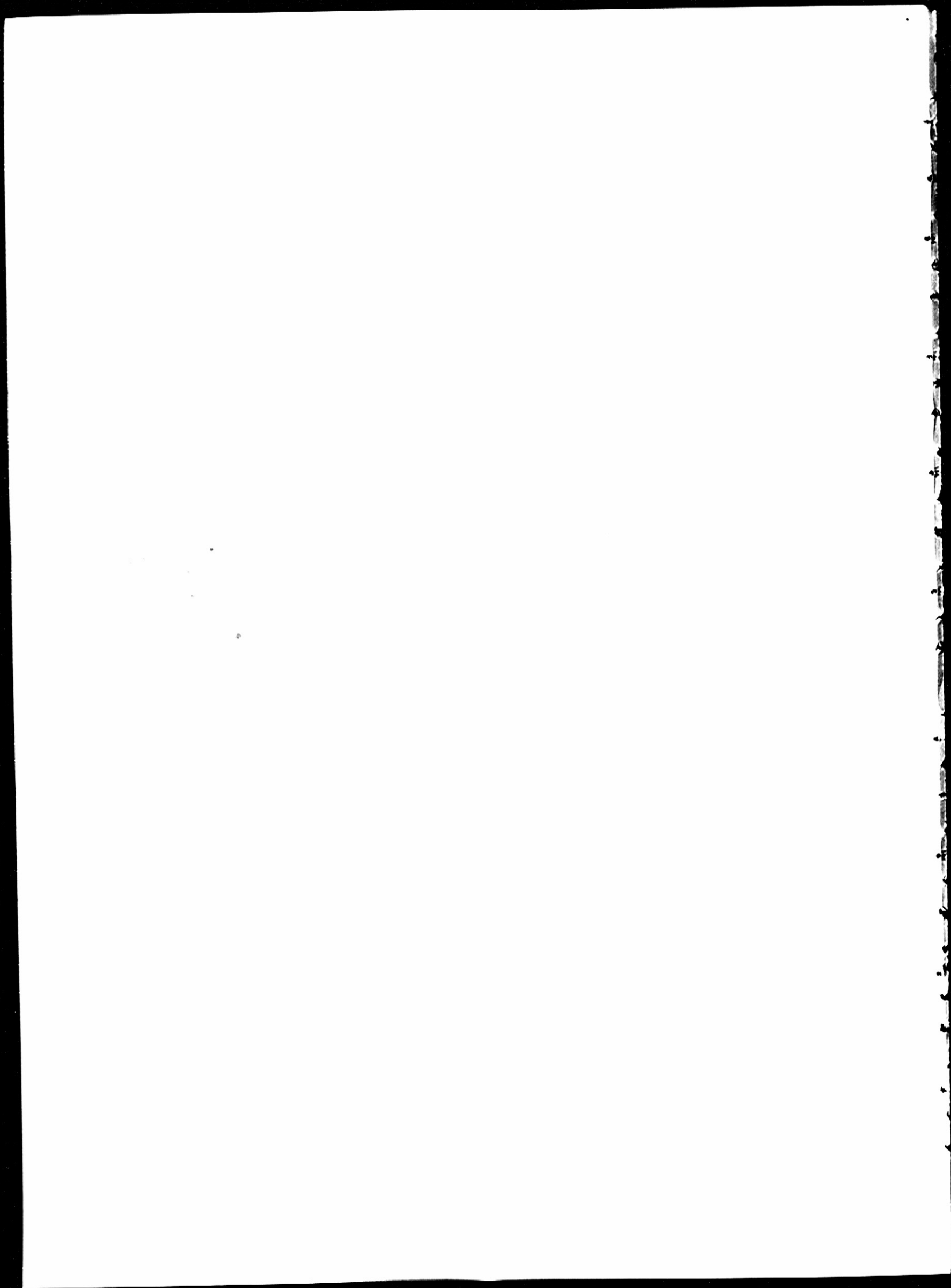
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852



STATEMENT OF QUESTIONS PRESENTED

I

Is an alleged oral confession admissible which is obtained from a prisoner held in violation of Rule 5 (a) of the Federal Rules of Criminal Procedure?

II

Is an alleged oral confession admissible when it is obtained from a prisoner who is not advised of his right to the assistance of counsel for his defense?

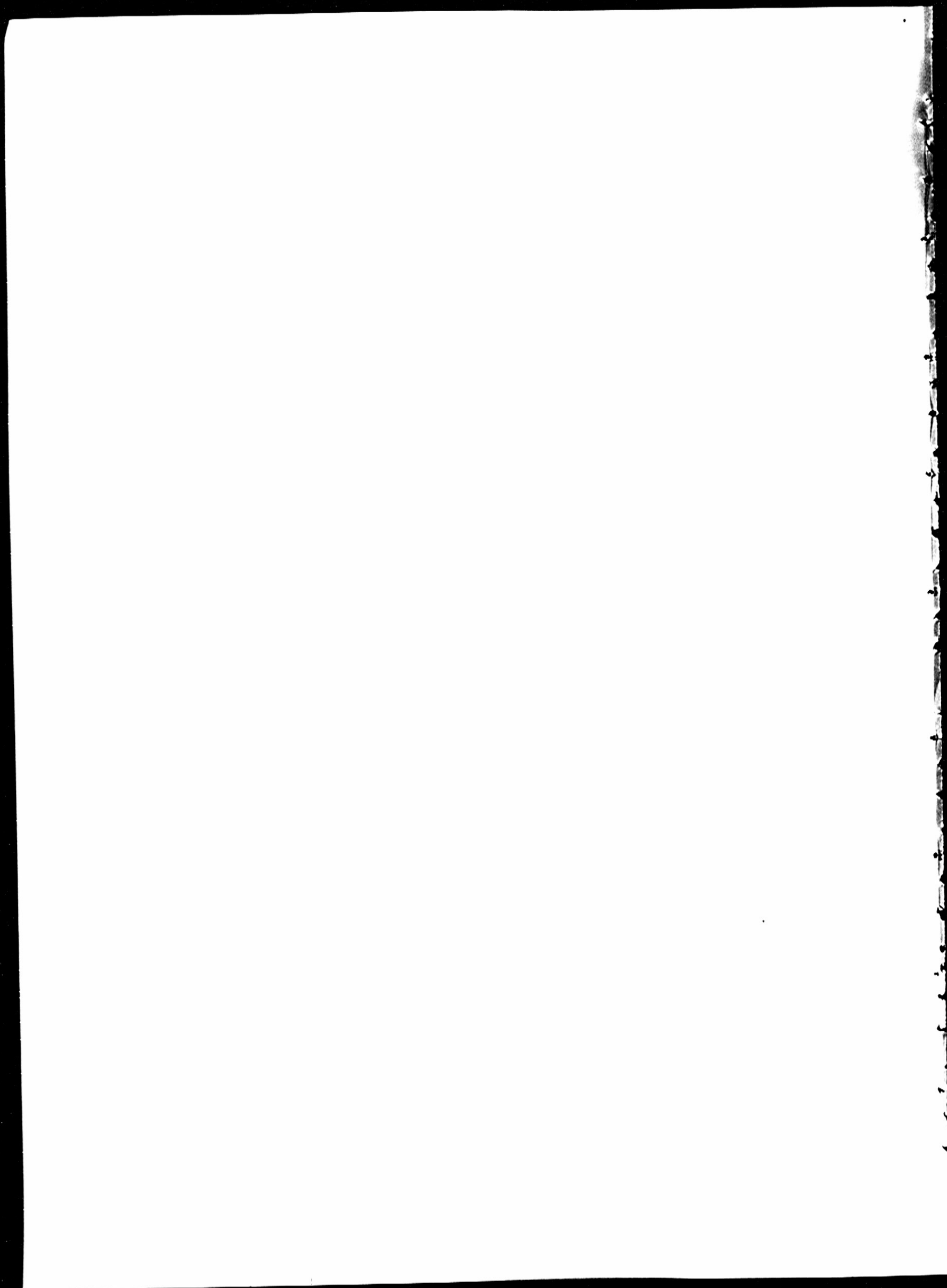


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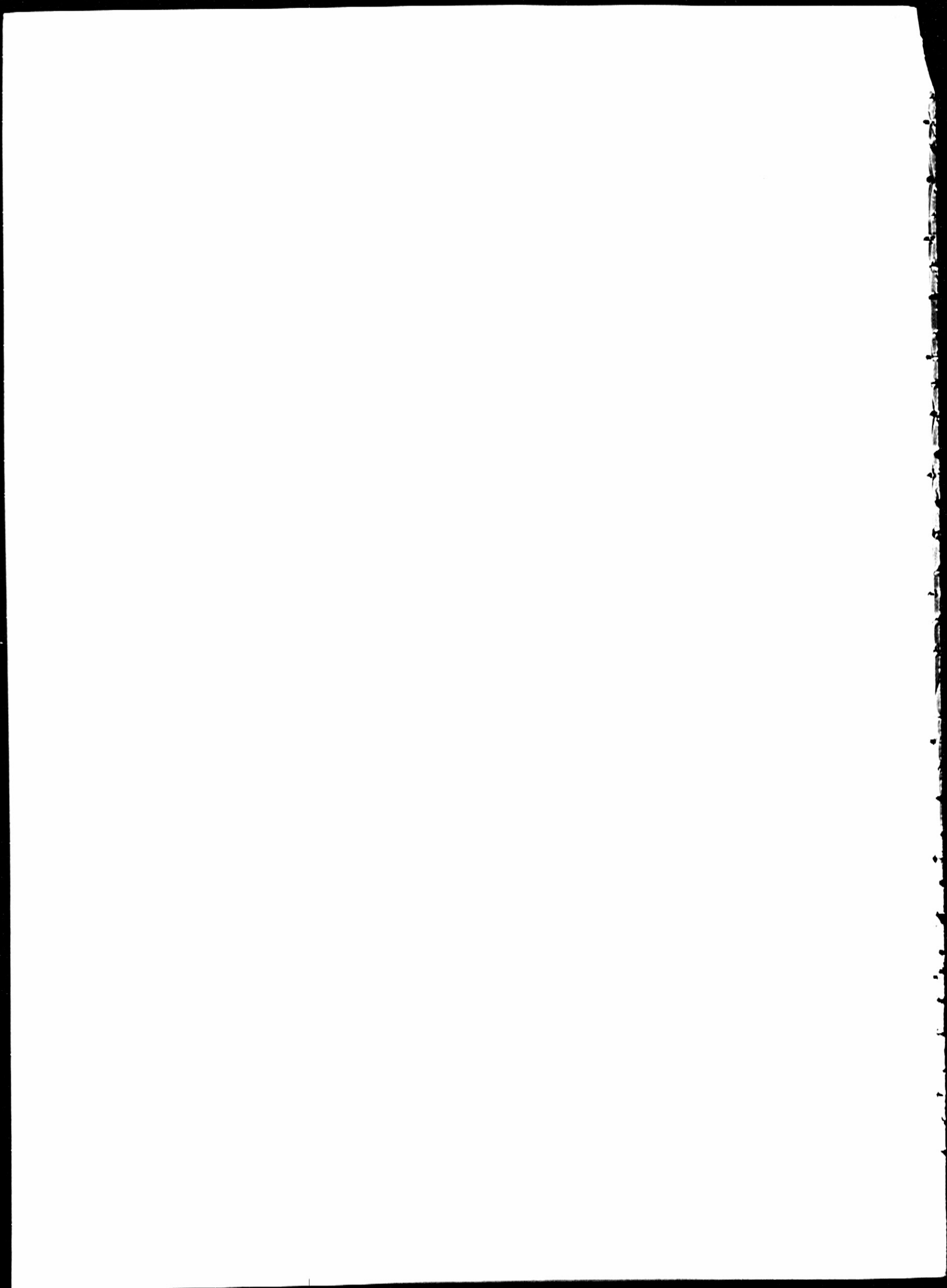
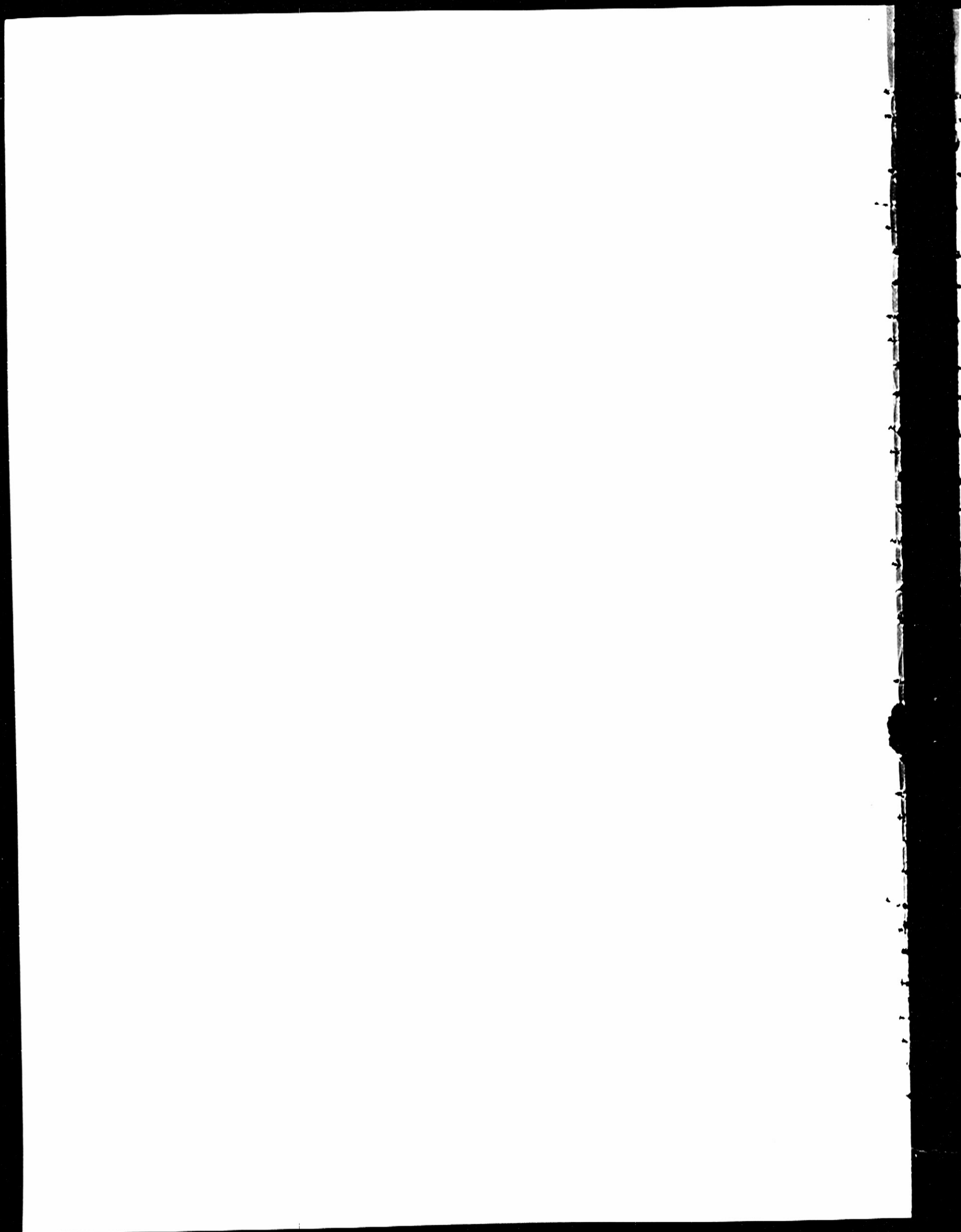


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IN THE
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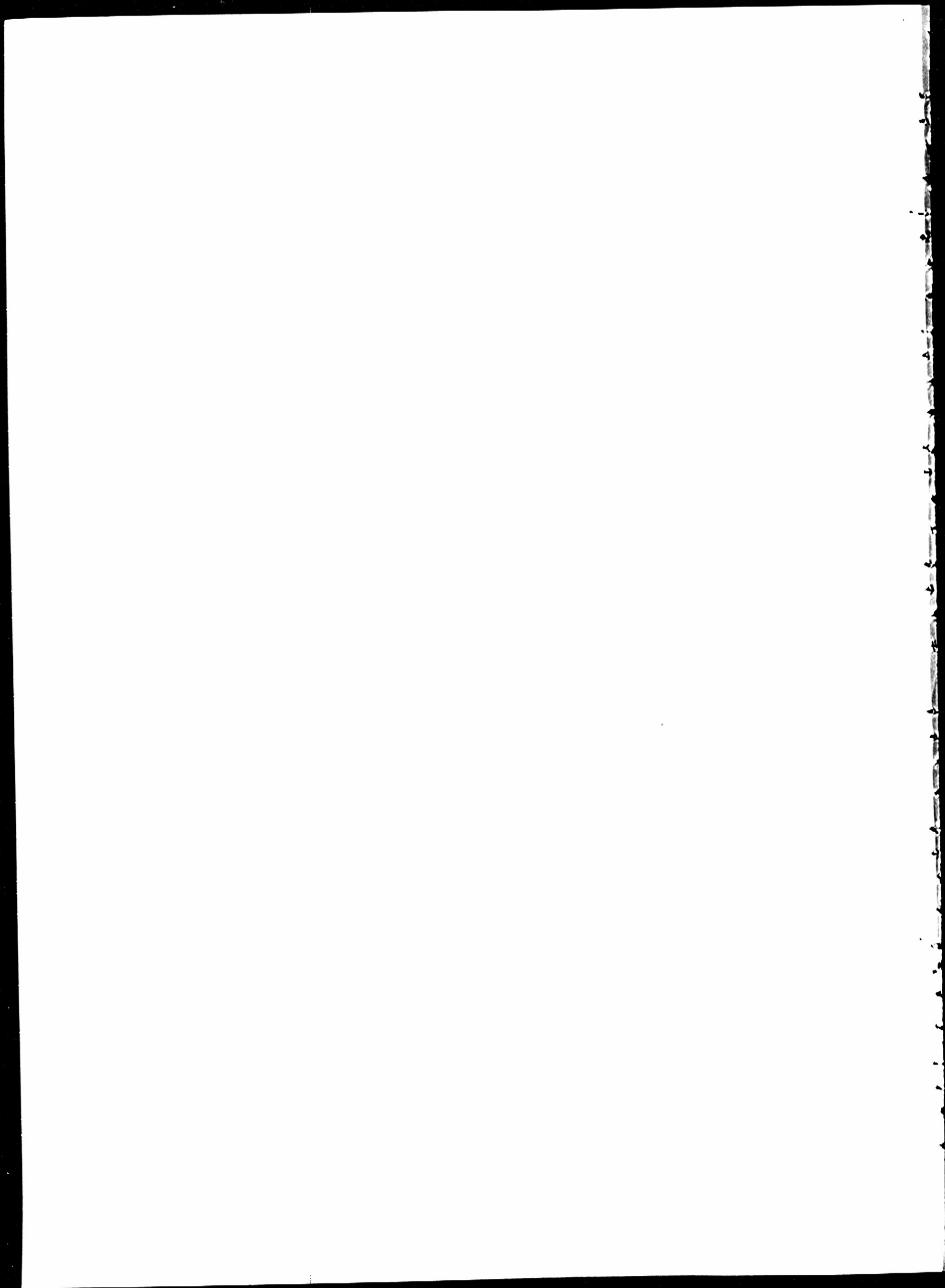
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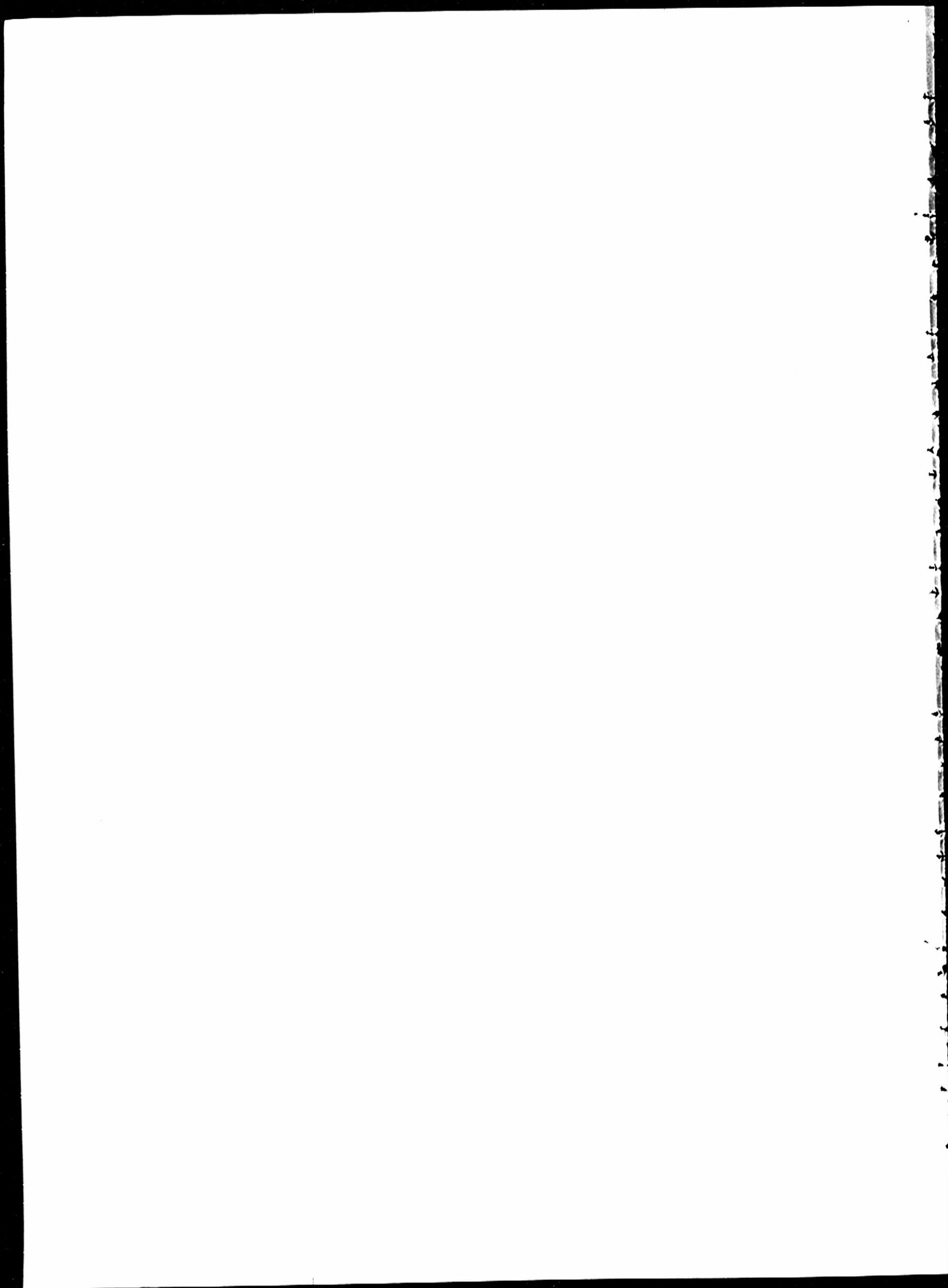
On Appeal from Verdict and Sentence of
United States District Court
for the District of Columbia

BRIEF FOR APPELLANT



JURISDICTIONAL STATEMENT

This is an appeal from a judgment dated the 5th day of June, 1964, finding Jerome Curtis guilty of taking or attempting to take immoral, improper or indecent liberties with a person under the age of sixteen years. Such judgment being a final decision of the United States District Court for the District of Columbia is appealable to this Court (28 U.S.C.A.). Permission to proceed on appeal without prepayment of costs was granted by the District Judge on 18 June 1964 and 23 June 1964.



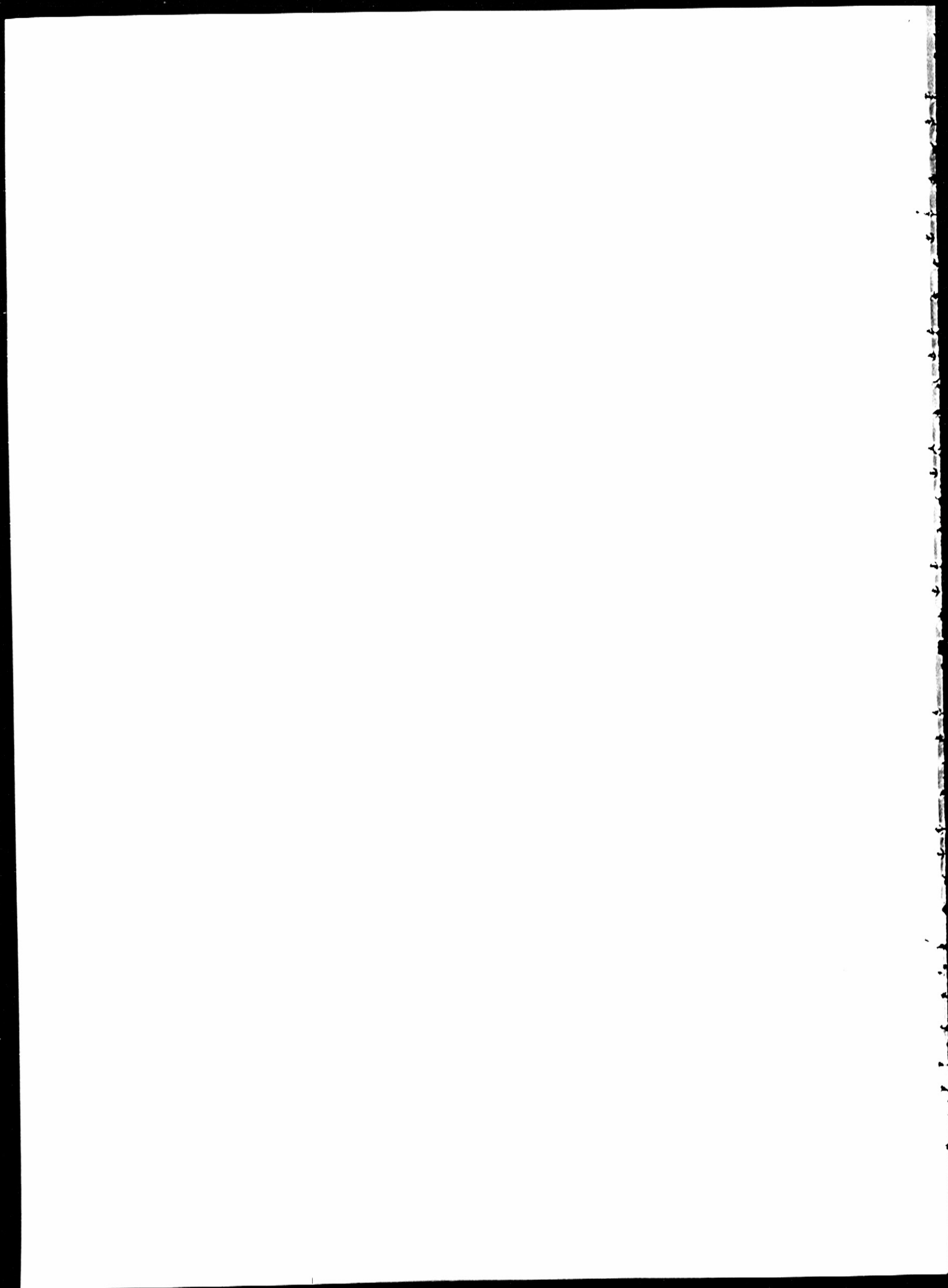
STATEMENT OF CASE

On 19 December 1963, Appellant attended a party in the apartment of Sydney Delaney at 1358 Girard Street, N.W., Washington, D. C. The complaining witness, Oleatha P. Elliott, fourteen years of age, two other girls (14 and 15) and at least four other young men also attended the party, which continued from mid afternoon to early evening. Some of the guests were constantly present and some were intermittently absent, but returned later. (Tr. 9)

The complaining witness stated that appellant and others had sexual relations with her. (Tr. 12) Appellant denied that he did. (Tr. 275)

Later in the evening, when appellant returned to his home, his family told him the police had called for him. (Tr. 270) At about 11:15 PM, appellant called the police station and was asked to come in. (Tr. 271) Appellant and Ulysses Delaney went to a policeman on the beat, who called for a police car to take them to the station (Tr. 302) where at about 12:40 AM, appellant arrived and was questioned. (Tr. 270) Appellant was booked about 1:15 AM.

Appellant testified that although he was not advised that he was not required to make any statement and that if he did make one, it might be used against him (Tr. 277), he denied that he had raped the complaining witness, and he

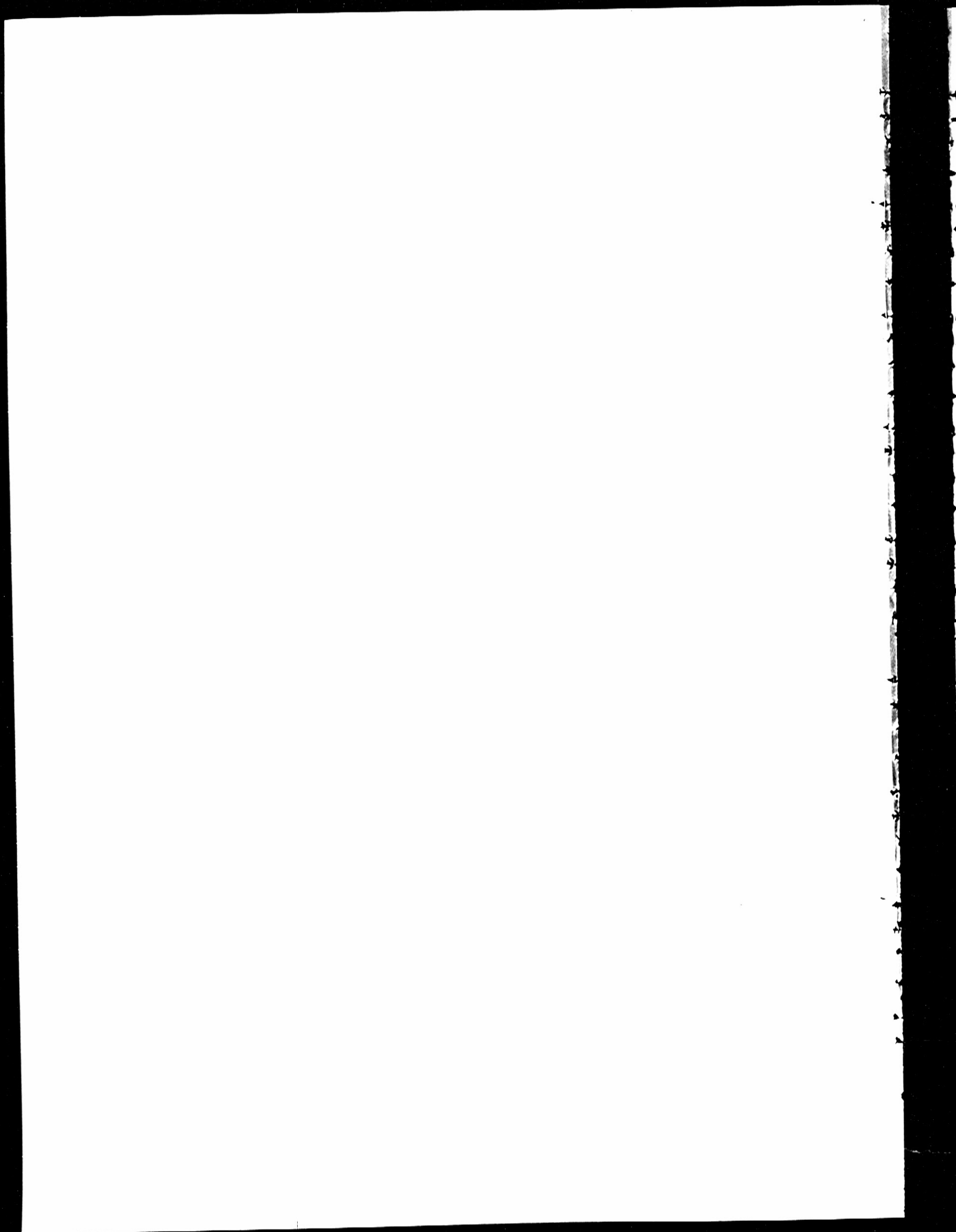


admitted that he had had relations with her before.
(Tr. 284, 294-295)

Detective Lewandowski, the only officer who questioned appellant (Tr. 449), testified that:

1. He advised appellant of his right not to make a statement (Tr. 249, 441).
2. He could not recall all of and the exact words used by appellant (Tr. 407).
3. Appellant made a "threshold" confession, orally admitting the charge (Tr. 257).
4. No written confession or written record of an oral confession was made, signed or offered (Tr. 256, 257, 408).
5. He did not advise appellant that rape was a capital offense (Tr. 441).
6. He did not advise appellant of his right to the assistance of counsel (Tr. 249, 274, 277).
7. He was aware of the Mallory and McNabb rule (Tr. 257, 260-262).

The charge was that appellant "carnally knew and abused" the complaining witness (22 D.C.C. §2801) but appellant was convicted of "taking or attempting to take immoral, improper or indecent liberties" with the complaining witness (22 D.C.C. §3501) and appellant was sentenced under



the Federal Youth Corrections Act (18 U. S. Code § 5010(a)).

STATUTES OR RULES INVOLVED

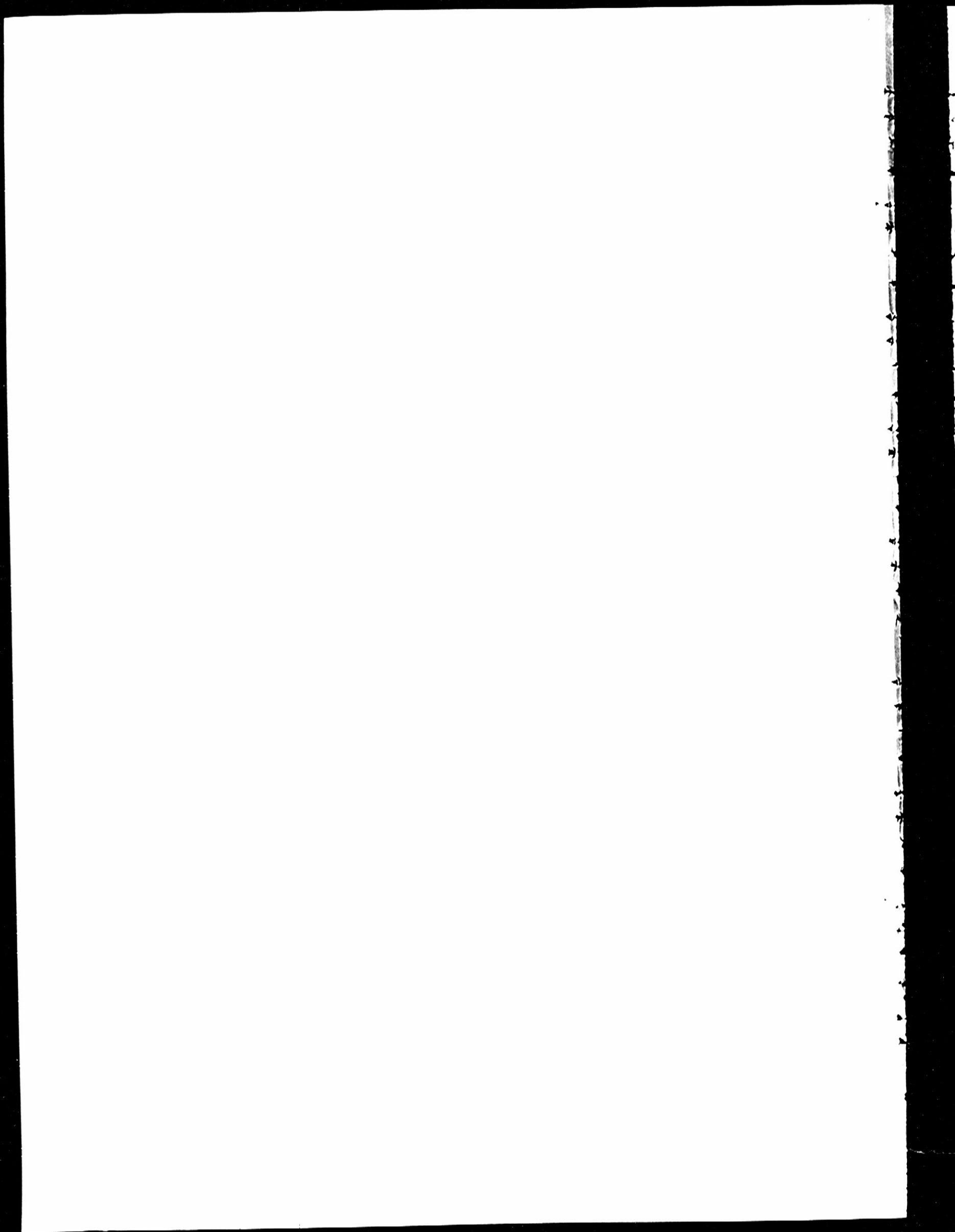
Federal Rules of Criminal Procedure

Rule 5.

PROCEEDINGS BEFORE THE COMMISSIONER

(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.



STATEMENT OF POINTS

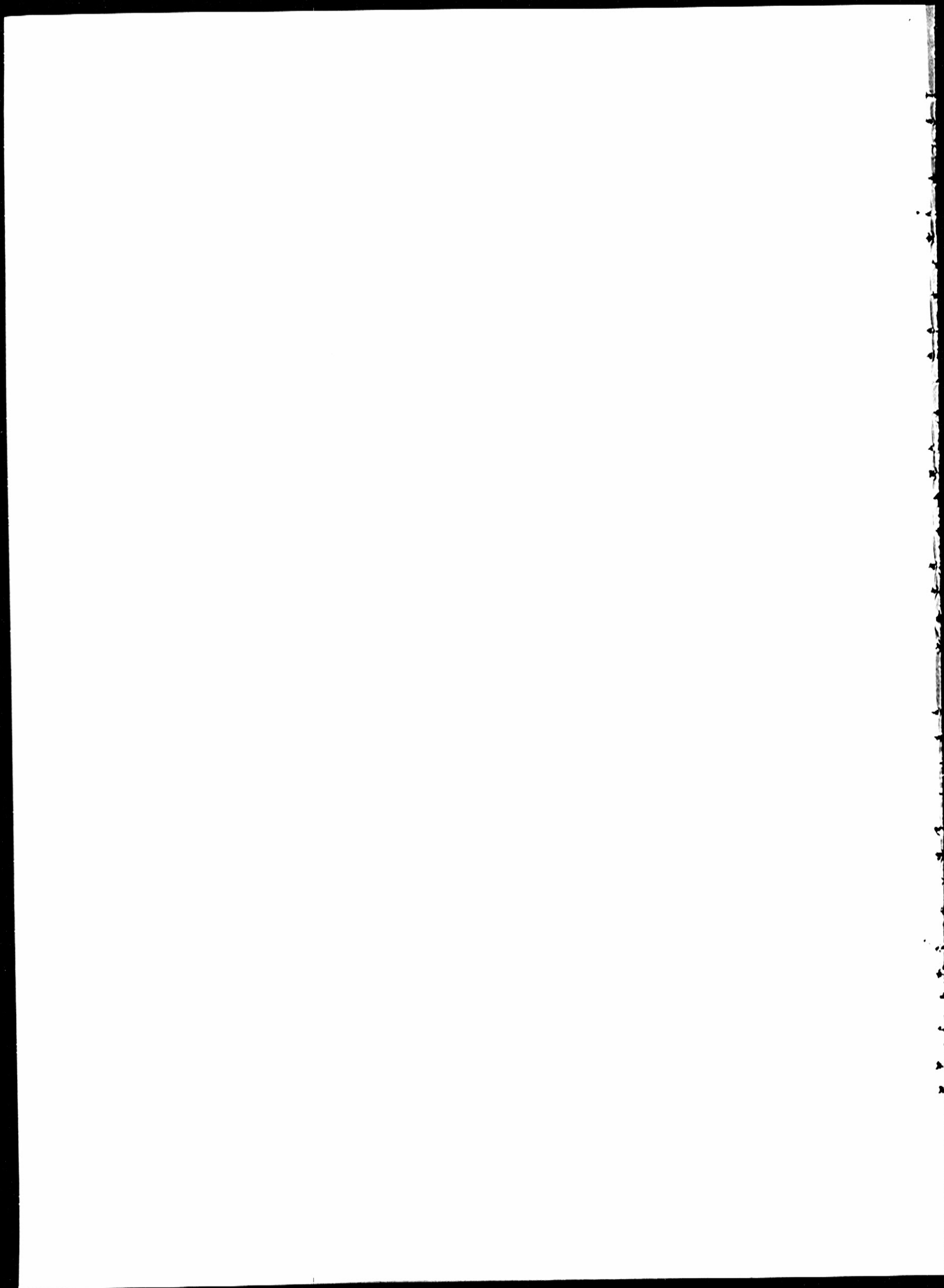
I

A person accused of crime may not be interrogated for the purpose of eliciting a confession without first being taken before a committing magistrate; or if he is, the confession so obtained is involuntary and inadmissible.

II

A person accused of a crime may not be interrogated for the purpose of eliciting a confession without being offered the assistance of counsel for his defense; or if he is, the confession so obtained is involuntary and inadmissible.*

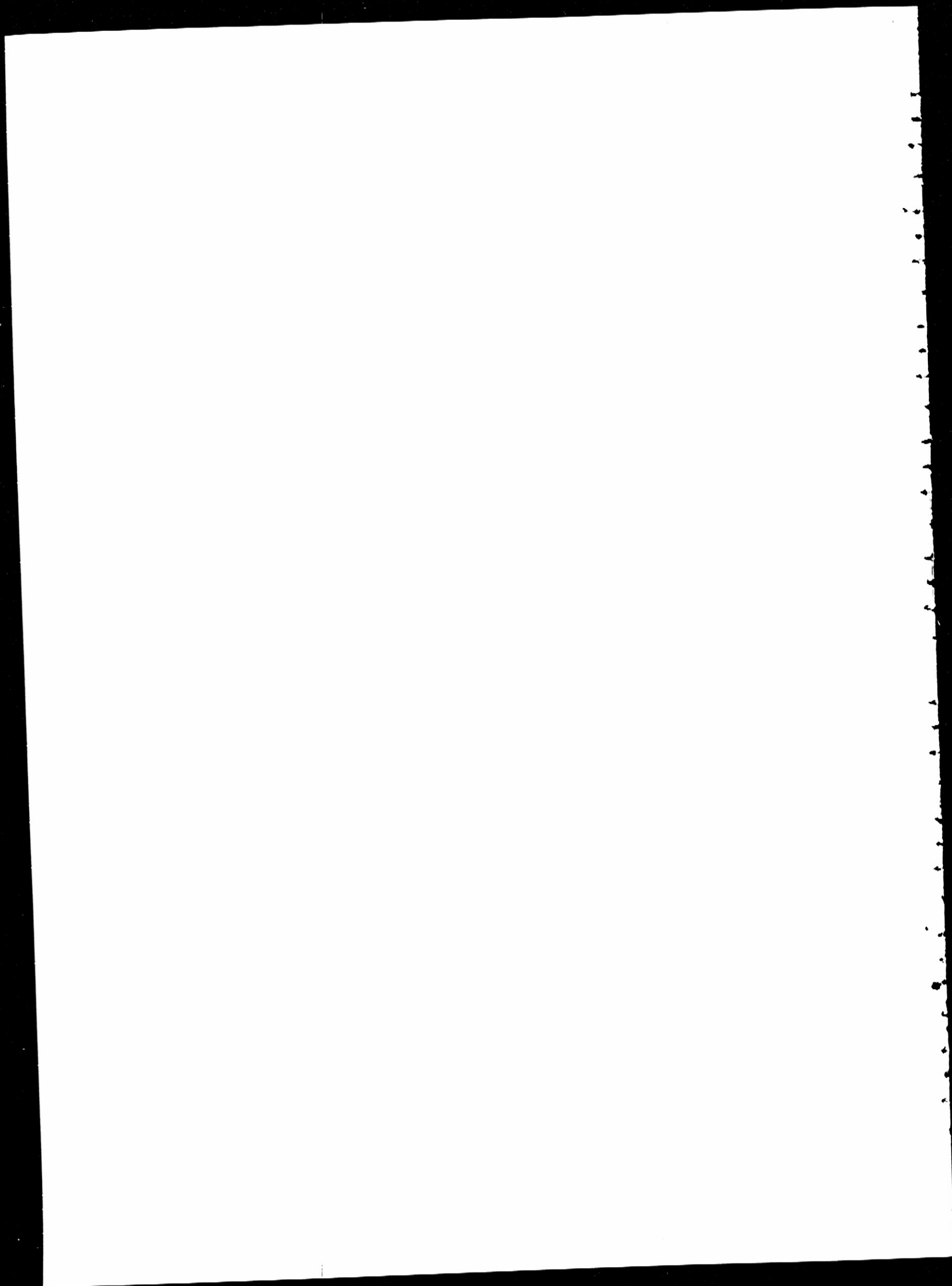
*/ Escobedo v. Illinois, 378 US 478.



ARGUMENT

Appellant, a minor, was told by his mother that the police wanted to talk to him. Sometime after 11:00 PM, he telephoned the Police Precinct and talked with Detective Lewandowski who asked him to come in, he had some questions he wanted to ask him. He went to the policeman, on the beat, who called the police patrol. Appellant and his friend were then searched and taken in the Police Patrol to the Precinct Station. Appellant went upstairs to the Detective Squad Room where he met Detective Lewandowski and two other detectives. Appellant and his friend were separated and appellant was questioned for at least 30 minutes. Detective Lewandowski had heard the complaining witness accuse appellant as one of her attackers. The detective had personally asked appellant to come to the police station and appellant had come. There was no necessity for any questioning. Appellant should have promptly been taken before a committing magistrate.^{1/} As a matter of fact, the detective should have issued a summons to appellant to appear before a committing magistrate.

^{1/} Rule 5 (a) Federal Rules of Criminal Procedure
Spriggs v. U.S., 335 F 2d 283, 285, "Under the law, Spriggs was entitled to be taken to a magistrate for public advice by the magistrate as to his rights, including his right to counsel with an opportunity to obtain counsel." p. 285.



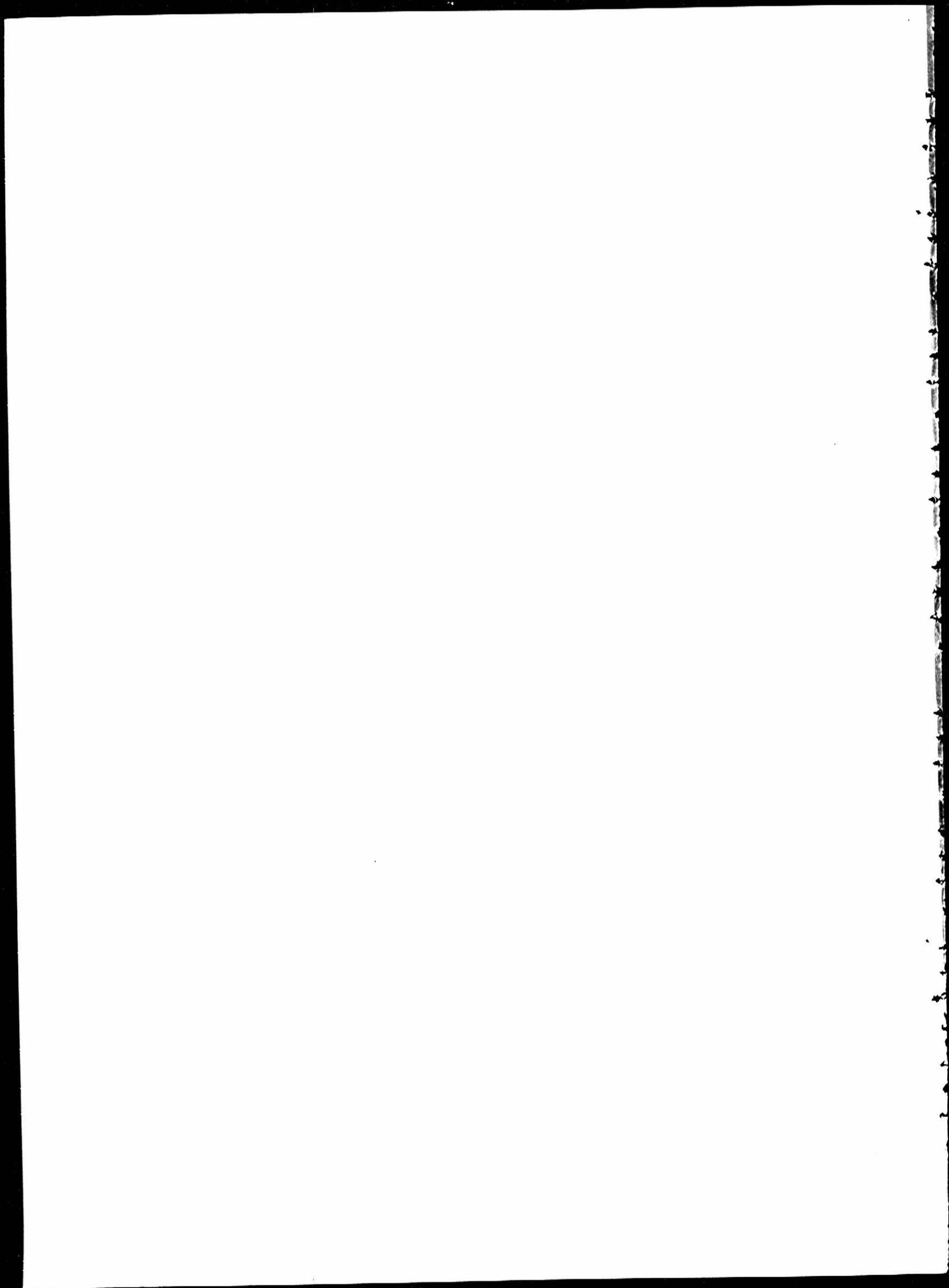
If this procedure had been followed, the committing magistrate would have advised the accused that he was not required to make any statement and that he might consult counsel.^{2/} If he were unable to obtain counsel, then one would be appointed for him.

Here, however, appellant was arrested and brought to the precinct station. The detective testified that appellant was not booked until after the interrogation was completed but the "line-up" sheet correctly indicated that appellant was arrested at 14th and Girard Streets before he was brought to the precinct station. (Tr. 248)

The interrogation and preparation of the "line-up" sheet took about 30 minutes. It was during this time that the detective testified that appellant admitted voluntary sexual relations with the complaining witness on that day;^{3/} yet appellant testified that while he admitted voluntary sexual relations with the complaining witness in the past, he denied

^{2/} Federal Rules of Criminal Procedure, Rule 5(b).

^{3/} Spriggs v. U.S., supra, Court held: "We do not agree that the admissions were "threshold". Just what occurred at the station, and its sequence, cannot be determined with accuracy. It is clear, however, that Spriggs was booked and then taken "upstairs" for questioning during a process of form-filling, instead, as required, being taken "as quickly as possible" to a magistrate after being booked. Mallory " p. 285.



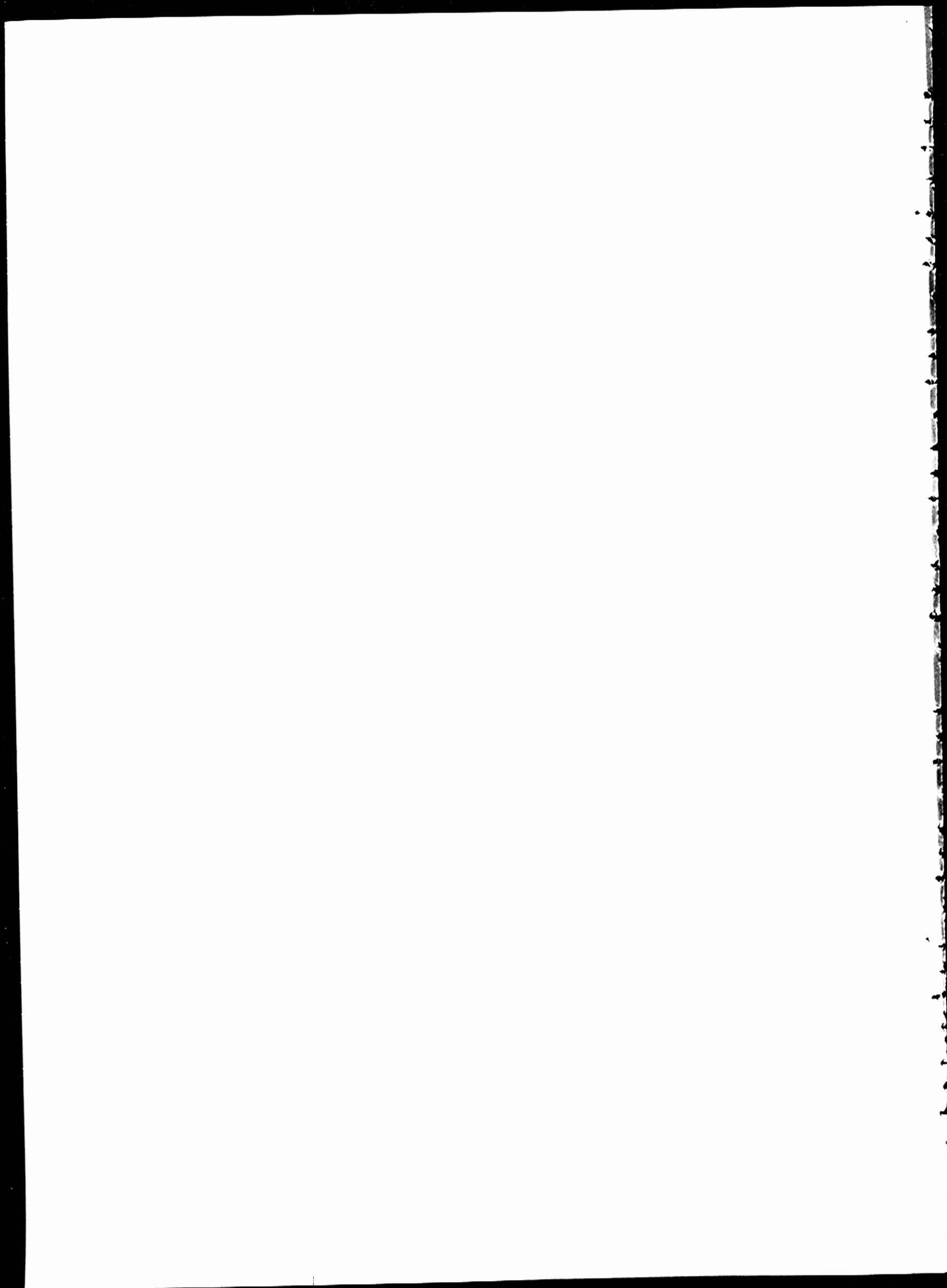
any sexual relations with her on that day.^{4/}

The detective testified that he advised appellant that he was not required to make any statement and that if he did it could be used against him or for him.^{5/} Appellant denied that he was so advised. The detective admitted that he did not tell appellant he was accused of a capital offense^{6/} and that he might be sentenced to die if he were found guilty; and the detective admitted that he did not offer appellant the assistance of counsel for his defense or seek to obtain

4/ Spriggs v. U.S., supra.

5/ Spriggs v. U.S., supra, "It is of little consequence that the officer says he advised Spriggs he need make no statement and if he did it would be used against him. Under the law Spriggs was entitled to be taken to a magistrate for public advice by the magistrate as to his rights, including his right to counsel with an opportunity to obtain counsel. In the varying circumstances affecting different persons, with differences in their experience, education and other individual attributes, it is impossible to measure accurately the pressures in a Police Station upon prisoners under secret interrogation without counsel, relative or friend."

6/ Escobedo v. Illinois, 378 U.S. 478; 12 L. Ed. 977, 986. "Among the critical circumstances which distinguish (Crooker v. California, 357 US 433) from this one are that the petitioner there, but not here, was explicitly advised by the police of his constitutional right to remain silent and not to "say anything" in response to the questions ... in any event, to the extent that Crooker may be inconsistent with the principles announced today, they are not to be regarded as controlling."



counsel for him. The detective did not promptly take appellant before a committing magistrate. Appellant was not so taken until about 10:00 AM in the morning.

The detective did not reduce to writing the statements made by appellant. He did not make any record or memorandum of the statements made by appellant. He admitted on cross-examination that he could not recall the exact statements made by appellant. Yet, he was sure appellant confessed to a capital offense and he so testified.^{7/}

The trial judge permitted the detective to so testify before the jury. However, the trial judge instructed the jury that it was to pass on the question of whether the

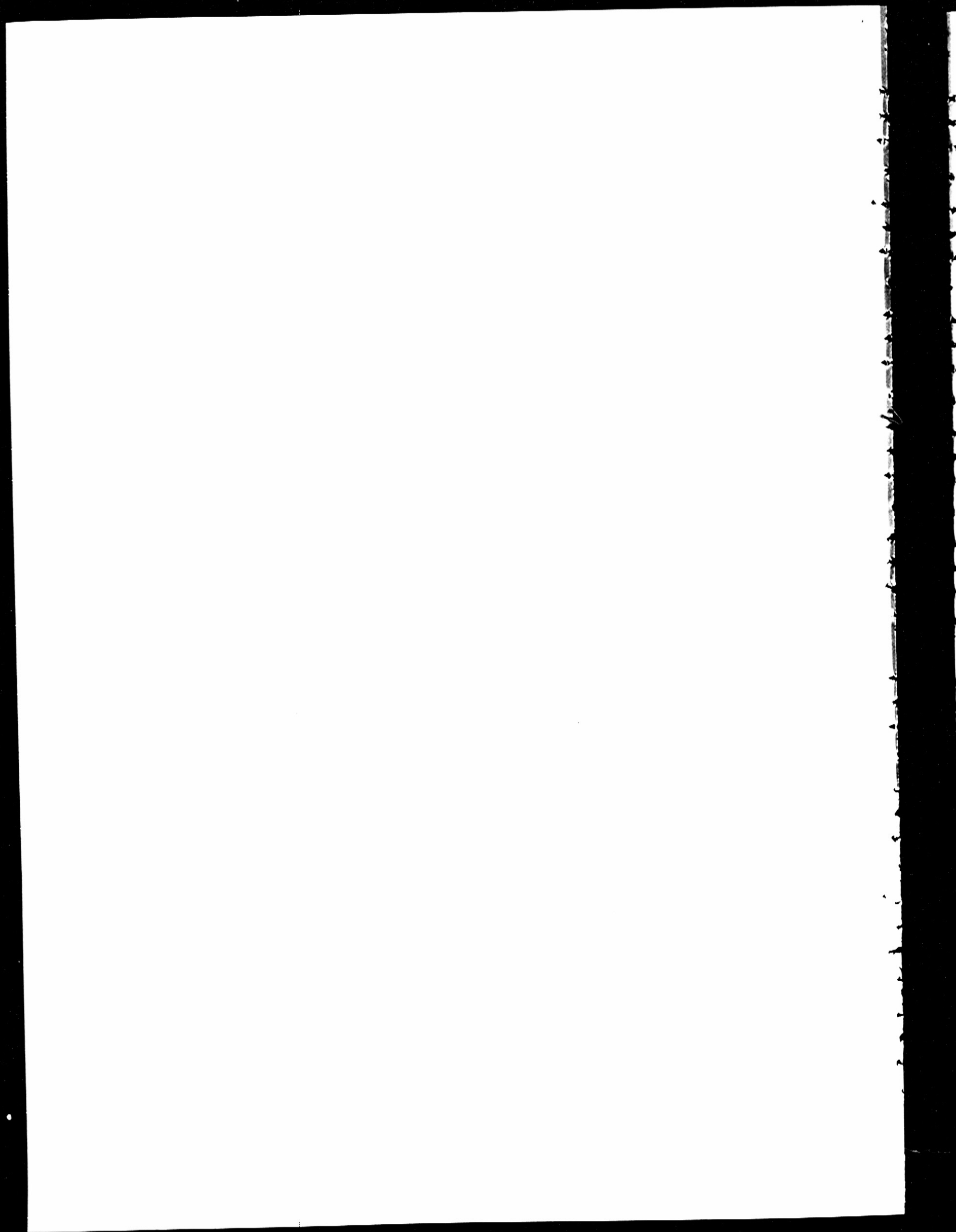
Spriggs v. U.S., supra.

7/ The unreliability of evidence of statements then said to have been made as well as the need to obtain compliance with Rule 5(a) is one of the reasons the Supreme Court adopted the Rule of evidence regarding confessions.....p. 285.

The Mallory-McNabb rule.....takes into account the unreliability of evidence obtained by secret interrogation. We add that the rule is related also to the constitutional protection of the Fifth Amendment against compelled self-incrimination, and to the guarantee of the Sixth Amendment of the right to counsel and to a public trial,....." p. 286.

Berger (dissent)

It is not delay per se which is prohibited by Mallory; it is the interrogation process which is restricted. I would not act without an adequate record developing all the facts.

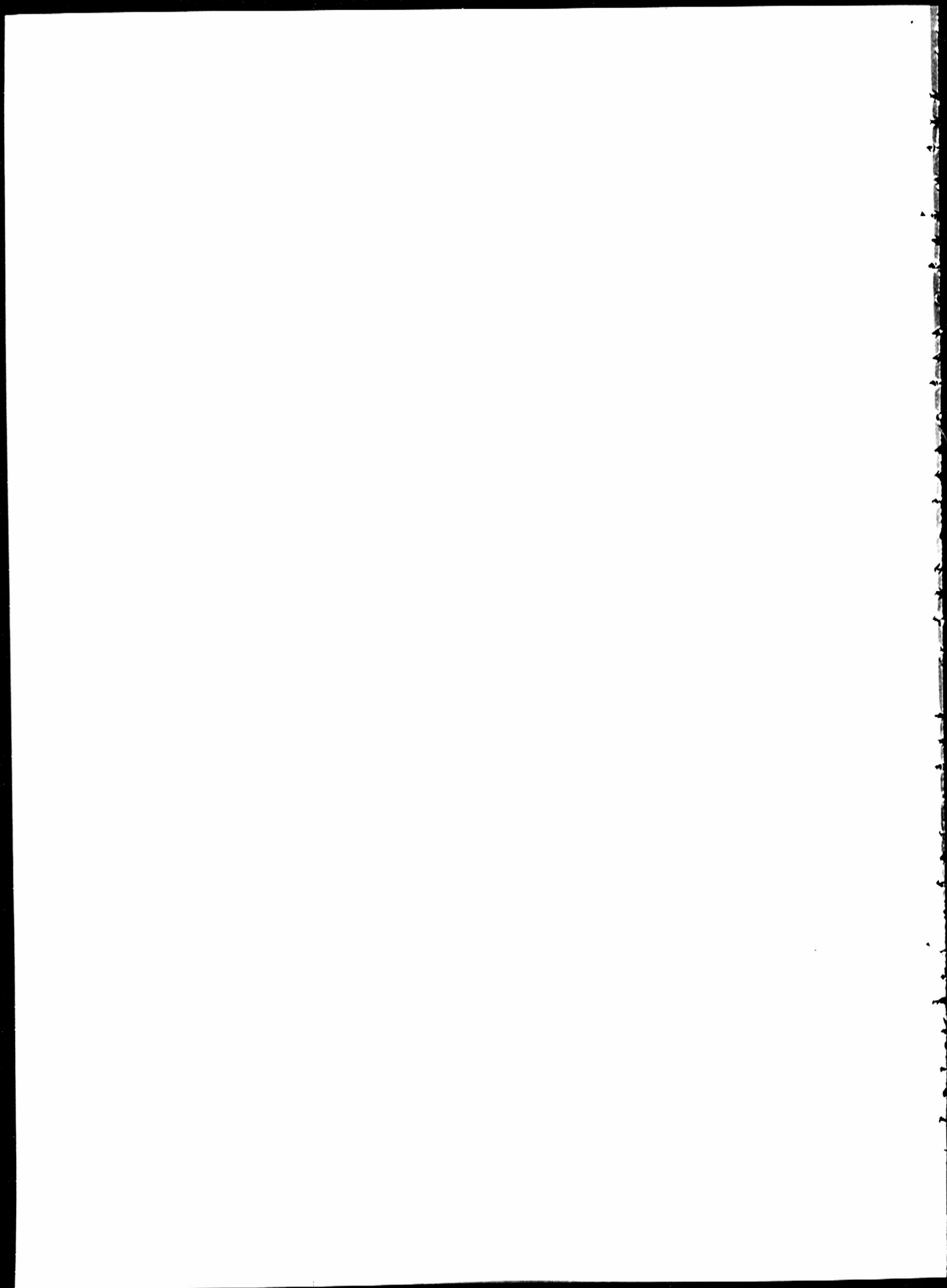


"confession" was voluntary or involuntary.^{8/} But we have no way of knowing what the jury decided for it made no specific finding on this question; it just rendered a general verdict.^{9/} The trial judge should not have permitted the detective to testify to the "confession". The trial judge should have determined that the "confession" was involuntary, was extracted while appellant was being held in violation of Rule 5(a) of the Federal Rules of Criminal Procedure and was extracted before appellant had the benefit of the assistance of counsel for his defense.

Counsel should have been appointed for appellant before he was interrogated. The detective had the information about the complaint. The detective successfully located appellant and identified him as one of the guests at the party. The detective, then and there, should have realized that the adversary proceedings had begun and had focused upon

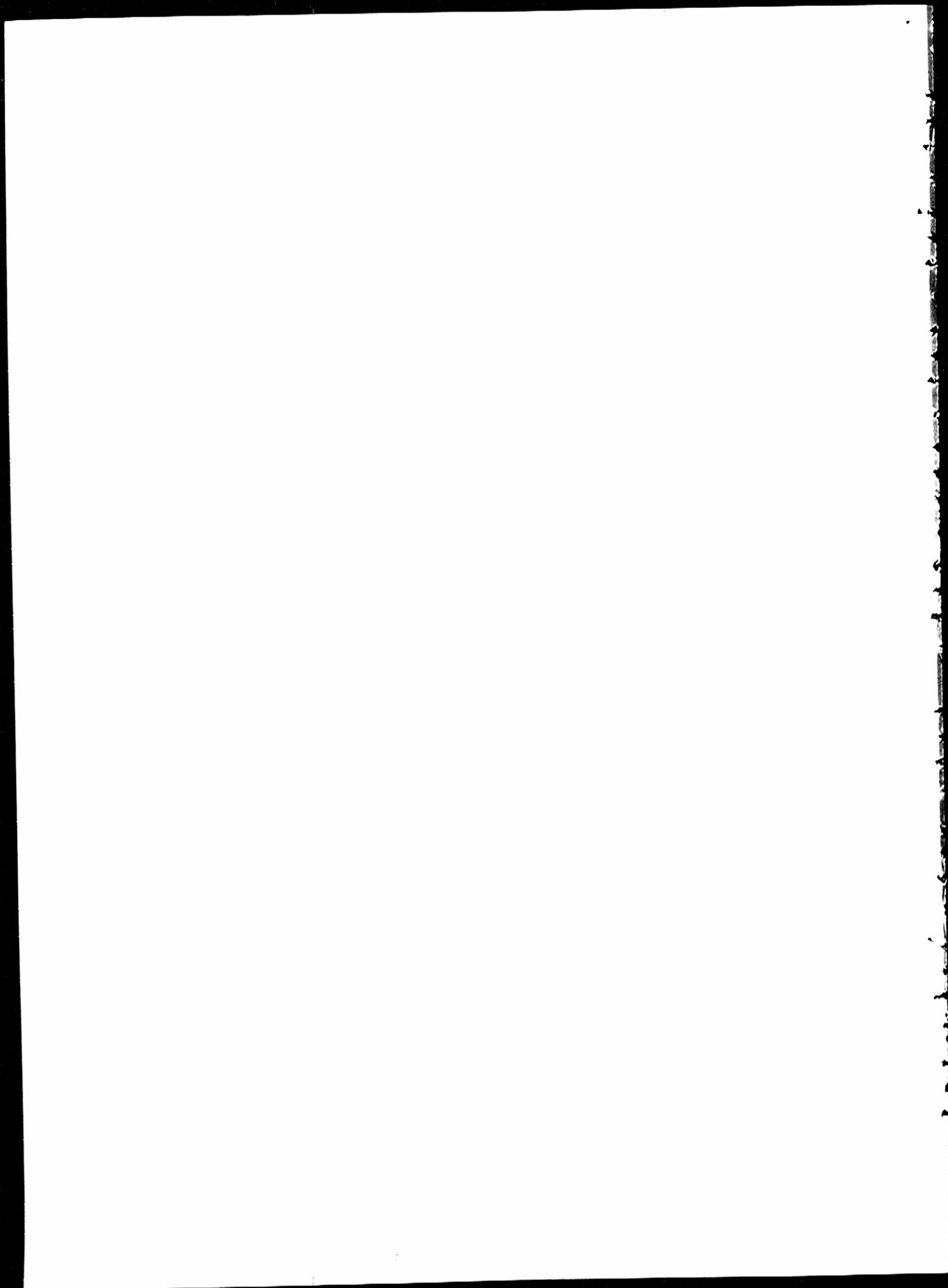
^{8/} Jackson v. Denno, 378 U.S. 368 (1964). This is exactly the procedure which was followed in the New York trial court and which was held to be a denial of Due Process. p. 380.

^{9/} Jackson v. Denno, supra, p. 395.
The trial judge should have himself passed on the voluntariness of the alleged oral confession.



appellant.^{10/} He should have issued a summons to appellant to appear before a committing magistrate, who could advise him of his constitutionally guaranteed rights and who could have appointed counsel to assist him in his defense. This was not done and it was error to not do it. It deprived appellant of due process of law in violation of the 5th Amendment and the "confession" - the fruit of the denial of due process - should have been excluded by the trial judge. And the failure of the trial judge to so exclude it is reversible error.

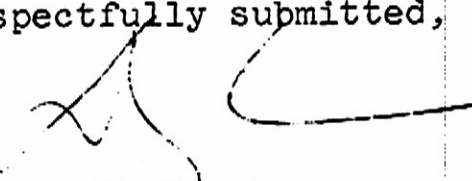
^{10/} Escobedo v. Illinois, supra.
Vol XXXI Journal of the Bar Association of the District of Columbia, 502.



CONCLUSION

The judgment appealed from should be reversed and the case should be remanded to the District Court with instructions that if a new trial is ordered, the trial judge should pass on the voluntariness of the alleged oral confession.

Respectfully submitted,



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REpublic 7-7137

*At the time of my appointment as counsel for appellant, the junior bar section of the Bar Association of the District of Columbia appointed Harvey Rosen, a law student at George Washington University Law School, as student assistant. I wish to acknowledge his competent and cheerful services.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18737

JEROME CURTIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

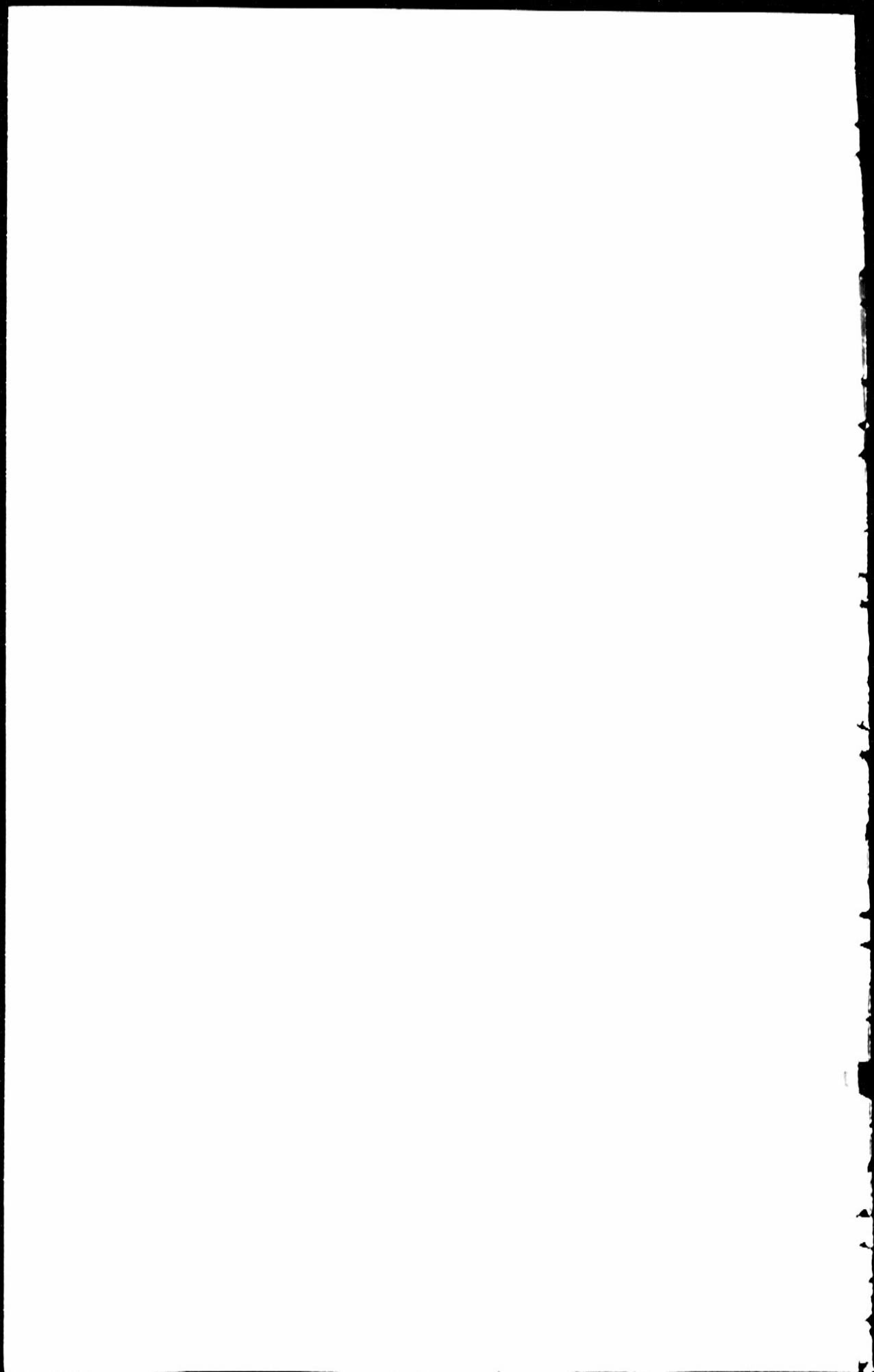
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United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 15 1965

Nathan J. Paulson
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QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

(1) Were appellant's threshold admissions properly admitted in evidence over a *Mallory* objection, where they were made within five minutes of the time he was effectively under arrest?

(2) Was appellant denied the right to counsel where he confessed within five minutes of his arrest, before he had been booked and after he had been advised of his right to remain silent, but without having been offered the assistance of counsel?

(X)

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*Cases chiefly relied upon are marked by asterisks.

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*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed January 6, 1964, appellant and two co-defendants¹ were charged with carnally knowing and abusing a female child under the age of sixteen years, in violation of 22 D.C. Code § 2801. In April 1964, appellant was convicted by a jury of taking indecent liberties with a person under the age of sixteen years. He was sentenced under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b), by judgment and commitment filed June 5, 1964, and this appeal followed.

The evidence at trial

The evidence of appellant's guilt was clear and convincing; the testimony of the complaining witness, Oleatha Peggy Elliott, was amply corroborated in all respects.

¹ Appellant's co-defendants, Ulysses V. Delaney and William M. Hubbard, pleaded guilty to the offense of assault with intent to commit carnal knowledge. They were each sentenced on March 26, 1964, under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b).

On the afternoon of December 18, 1963, a party was in progress at the home of Sydney and Ulysses Delaney, apartment 9 on the third floor at 1359 Girard Street, N.W., in the District of Columbia (Tr. 6, 8, 9, 78, 119). Present were several young people—the appellant Jerome Curtis, Peggy Elliott, the Delaney brothers, William Hubbard (known as Squeaky), Betty Morgan, Caroline Taylor, Ruben Lee, and a few other boys (Tr. 27, 109-10, 120). From about 3 p.m., when Peggy Elliott and Betty Morgan arrived, until about 6 p.m., the friends danced, played records, and talked. Peggy spent part of the time talking with Ruben Lee, with whom she was "going" at the time. (Tr. 8-10, 101, 157-58.) Late in the afternoon, the appellant called Ruben over and asked Ruben whether he, the appellant, could "get down" with Peggy; Lee said he could not (Tr. 10, 33-35, 137, 151-52). Another boy, either Ulysses Delaney or William Hubbard, asked Ruben for the same permission (Tr. 10, 151-52). Ruben returned to Peggy and shortly thereafter she decided to go home. While Ruben looked for his hat, Peggy got her coat and told Caroline and Betty that she was leaving. The appellant left the apartment after Peggy, and Ulysses and Squeaky followed. (Tr. 10-11, 35-36, 79, 107, 120-21, 138, 149, 152-53, 160.)

Peggy testified that as she was going out the door and down the stairs, the appellant grabbed her by the arm and said "Come here, baby." She asked what he wanted, and he pushed her into a communal bathroom about 3 or 4 feet from the stairs. After shutting and locking the door, appellant asked Peggy why she didn't go with him; she replied that it was because she couldn't stand him. After some further conversation to the same effect, appellant began beating Peggy on the face "and everything." Someone knocked on the door and appellant went out of the bathroom; when Peggy tried to open the door she found that someone was leaning on it.

When appellant returned to the bathroom, he told Peggy she was going to give herself up to him² or else he was going to kill her. The girl replied that he would then have to kill her. At that point Ulysses and Squeaky entered the bathroom, and

² This, Peggy testified, she took to mean have sexual relations with him (Tr. 13).

appellant said if she didn't give herself up to him, she would give herself to all three. Appellant said he would count to three, and did. Since Peggy had not answered, appellant hit her. Then all three boys started pulling at her clothes. After her underwear was off, they all had sexual relations with her, without her consent, on the floor—first appellant, then Squeaky, and finally Ulysses. (Tr. 11-14, 31, 60-65.)

After this, Squeaky and Ulysses left the bathroom. When Ulysses told appellant to bring Peggy out, since she was making too much noise, appellant dragged her into the kitchen of the Delaney apartment and threw her on a rollaway bed. After appellant blocked her first attempt to leave the apartment, Peggy was able to effect her escape. She recalled starting to run down the stairs, but nothing after that until she awoke at D.C. General Hospital. (Tr. 14-15, 73-74.) She testified that she was in the bathroom about half an hour, and in the kitchen after the assault about fifteen minutes (Tr. 65, 71).

Peggy Elliott's testimony was corroborated by Betty Morgan, Caroline Taylor, and Ruben Lee. Betty, Caroline, and Ruben all saw the appellant leave the apartment right after Peggy (Tr. 79, 107, 120-21, 138, 149, 153); Caroline placed this at about 5:30 or 6 p.m. (Tr. 120). Betty testified that she went to the door after Peggy and saw appellant grab the girl's arm at the top of the stairs, about 4 or 5 feet from the bathroom door (Tr. 108-09). Unable to find his hat, Ruben decided to leave without it, intending to walk Peggy home. He went into the hall, but saw no one there. He heard some hollering, but no one answered when he knocked on the bathroom door, and he returned to the apartment. (Tr. 149, 160-62.)

About ten minutes after Peggy and appellant left the apartment, Caroline, Betty, and Ruben heard Peggy screaming and went to the door (Tr. 79, 111-13, 121, 139-40, 149, 165). Appellant was standing in the hall (Tr. 141, 149, 166). Ulysses, who was at the door of the apartment, pushed Betty and Caroline back into the apartment (Tr. 79, 112-13, 121). Betty testified that appellant came to the apartment and asked "did anybody want some," and Ulysses or Squeaky went into the bathroom (Tr. 79-80).

Both Caroline and Betty saw appellant bring Peggy back into the kitchen by holding her arm (Tr. 80, 115, 121-22). Peggy was then crying and holding her side (Tr. 122). Betty saw appellant put Peggy on the rollaway bed and lie on top of her. She also testified that when appellant got up, Peggy grabbed her coat, ran out of the apartment, and fell down stairs. (Tr. 80.) Caroline also saw Peggy leave (Tr. 122, 125).

Detective Charles Chase of the Sex Squad and Detective Ludwig Lewandowski of the 10th Precinct both responded to 1359 Girard Street on December 18. They found Peggy Elliott in an apartment on the second floor, very excited and incoherent, crying, and holding her side and stomach. (Tr. 193-94, 196, 230-31.) When she was being placed in the ambulance, Peggy was incoherent and saying "Don't let him hurt me." She kept mentioning "Jerome." (Tr. 453.) She was taken to D.C. General Hospital, and later, when her condition improved, Detective Chase took a complaint (Tr. 194, 231). Before they left the premises that night the detectives interviewed a group of teenagers that included Betty Morgan, Caroline Taylor, Ruben Lee, Sydney Delaney, Boyd Payne, and William Hubbard (Tr. 198, 200).

The physician who examined Miss Elliott at D.C. General on the night of December 18, 1963, testified that he found a bruise 2 cm square on her right cheek, that her external genitalia showed no signs of trauma, and that her hymen had been disrupted at some past date (it was raggedly and admitted two fingers with ease, the normal opening size admitting one finger with difficulty). The results of a smear test indicated the presence of intact sperm in the mucus outside the hymen and in the cervix, indicating that Miss Elliott had had relations within the previous 24 hours. (Tr. 83-86, 89-91, 95.) The doctor's report, Government Exhibit 4, was received in evidence (Tr. 95).

Peggy Elliott testified that she was born on July 7, 1949, and was 14 years old at the time of trial (Tr. 5-6). Her grandmother corroborated this testimony (Tr. 145).

At about 11:15 p.m. that same night, a person telephoned the 10th Precinct, identified himself to Detective Lewandowski as Jerome Curtis, and asked whether the police were looking for him. The detective inquired whether the caller had been

at 1359 Girard Street earlier in the evening, and the caller replied that he had, that he wanted to come in and get himself straight. Detective Lewandowski advised him to come down to the precinct. (Tr. 428, 437.)

At about 12:40 a.m. (on December 19), the appellant and Ulysses Delaney walked into the detectives' room on the second floor of the 10th Precinct. Detective Lewandowski, who had seen neither defendant before, asked who they were, and then asked whether they had been at 1359 Girard Street earlier that night. Upon appellant's admission that he had been, the detective advised him that there had been a complaint made against him of rape, and that he did not have to make a statement but that anything he did say would be used either for or against him. He also told appellant that the girl was under sixteen and that it was rape to have intercourse with a girl under sixteen. The appellant admitted that he "had had" Peggy Elliott in the bathroom that night, but stated that it was with her consent and that he had had her previously. (Tr. 427-29, 440-42, 446-48, 455-57, 465-66, 470-71.) As to it being rape to have intercourse with a girl under sixteen, appellant "kind of laughed," "kind of smiled" and said he had not known it was illegal (Tr. 450-51). Appellant's admissions were made within four minutes of the time he entered the squad room (Tr. 467-68).

After this, Detective Lawrence Mould took Ulysses Delaney into an adjoining room to prepare a lineup sheet (Tr. 457), and Detectives Lewandowski and McGroarty prepared such a sheet on appellant (Tr. 429, 445-46, 449-50). Appellant's answers to questions about his background, family, draft board, etc. were intelligible. Appellant told the officers he was 19 years old, but Detective Lewandowski did not recall him saying that he had been to the 11th grade or whether appellant could read. (Tr. 445-46, 451). Appellant and Delaney were booked at 1:15 a.m., about 35 minutes after they entered the squad room (Tr. 449).

In his defense, appellant submitted the testimony of Ulysses Delaney that although Ulysses had sexual relations with Peggy Elliott in the bathroom at 1359 Girard Street on December 18, 1963, and Squeaky was there, appellant was not present

at that time and Delaney "did not see" appellant assault or attack the girl or in any way attempt to have sexual relations with her that night (Tr. 486, 492, 500-01). Ulysses did testify that appellant was at the party that day, and that he saw appellant leave the apartment at about 5:30 and return about 5:45 (Tr. 486). He and appellant left 1359 Girard Street that night before the ambulance took Peggy to the hospital (Tr. 500). Later, he and appellant went to the police station because they had heard the police wanted to talk to them because a girl had complained that had raped her (Tr. 487, 499-500). Delaney testified that he and appellant stopped a street policeman who called a wagon to take them to the precinct. They waited about half an hour for the wagon, and arrived at the station at about 12:30 or 12:45 a.m. (Tr. 487-88.)³ Once on the second floor of the precinct, a detective asked them whether they knew the girl who had been assaulted (Tr. 489). Delaney testified that he did not hear the appellant say anything with respect to that particular offense, but rather that he (appellant) had had relationships with the girl before; Delaney did not recall appellant's precise words (Tr. 490).⁴ This statement of appellant was made about 5 minutes after the two arrived at the police station (Tr. 490). Appellant himself did not testify before the jury.

The testimony on the hearing

When it appeared that the government planned to introduce evidence of admissions made by appellant to Detective Lewandowski, the jury was excused and a lengthy hearing was held on the circumstances surrounding the making of these admissions (Tr. 232). Detective Lewandowski testified for the government, and appellant himself and Ulysses Delaney for the defense. The following facts were developed.

³ Delaney testified that a policeman took them upstairs (Tr. 488). Detective Mould testified that he was downstairs at the time and saw appellant and Delaney enter the building unescorted and, without talking to anyone, go upstairs. He followed about thirty seconds behind them. (Tr. 456, 459-60.)

⁴ Peggy denied having had intercourse with appellant prior to December 18, 1963, although she admitted having had relations with Sydney Delaney twice before that day (Tr. 36-37).

Late on the evening of December 18, appellant learned that someone had called his home⁵ and said the police wanted to talk to him about a rape case (Tr. 234, 277-79). He called the 10th Precinct at about 11:15 p.m., spoke to Detective Lewandowski, and arranged to come to the precinct to straighten things out (Tr. 233-34, 277-79). Immediately after the call, appellant started out for the police station. On the way, he met his friend Ulysses Delaney, who too knew that the police were looking for him; they continued on together. Because the night was cold and bitter and snow was beginning to fall, the two stopped a patrolman at 14th and Girard Streets and asked that a wagon be called to drive them to the station house. (Tr. 234, 244, 270, 279-80, 301-02.) According to both appellant and Delaney, appellant went to the station freely, voluntarily, and without objection, and was very cooperative when he arrived (Tr. 280-81, 315).

Detective Lewandowski and Delaney testified that appellant and Delaney arrived on the second floor of the police station at about 12:30 (Tr. 302) or 12:40 (Tr. 234, 245). Appellant, on the other hand, testified that the wagon came for them at about 11:45 p.m., that he and Delaney were searched before the wagon left,⁶ and that the journey to the station took about 7 minutes (Tr. 271-72). This would place the time of arrival at a few minutes before midnight. Delaney testified that he and appellant went up to the second floor immediately upon arriving at the station (Tr. 303-04);⁷ appellant claimed that they waited downstairs between five and eight minutes (Tr. 272-73). Detective Lewandowski recalled that they had come up alone, rather than with an officer (Tr. 245-46).

⁵ Detective Lewandowski testified that this call was not from the police department (Tr. 236). It appears from testimony by Ulysses Delaney before the jury that his brother Sydney had been to the police station and had told appellant and Ulysses that the police were looking for them (Tr. 487). Perhaps this information was relayed in the call to appellant's home.

⁶ Although he first testified that neither he nor appellant in his presence had been searched prior to booking, Delaney later stated that before they entered the patrol wagon, the man at the call box felt their pockets to see what was in them and gave their things back (Tr. 317-18).

⁷ Detective Mould corroborated this in testimony before the jury (Tr. 456, 459-60).

The detective testified that the first thing he did when appellant and his friend appeared in the squad room was to advise them that anything they said could be used for or against them and that they were not required to make any statement (Tr. 249-51). Appellant and Delaney denied that any such advice was given (Tr. 274, 276-77, 308). The detective then ascertained that appellant had been at 1359 Girard Street earlier that evening (Tr. 246-47, 281, 404), and advised appellant and Delaney that he had a complaint of rape from Peggy Elliott (Tr. 263-64, 282, 304, 404, 409). According to the detective, appellant said that he "had her in the bathroom and he had intercourse with her, and it was with her wishes" (Tr. 235, 247, 406-09). Delaney testified that appellant did admit having had sexual relations with the girl, but that he referred to some time in the past (Tr. 307, 309, 311-13). Appellant, on the other hand, testified that at this time he denied ever having had relations with her (Tr. 282-83, 293-94). Although they differed as to what date appellant referred to, Detective Lewandowski and Ulysses Delaney agreed that within three to five minutes of the time appellant arrived on the second floor of the precinct, he admitted having had sexual relations with Peggy Elliott at some time (Tr. 235, 246-47, 309, 313-14, 407-08). The detective also testified that appellant said he thought that although the girl was fourteen years old it was all right, provided it was with her wishes (Tr. 235).

A few minutes after they arrived in the squad room, Delaney was taken into another room where he was questioned for about ten or twenty minutes (Tr. 273, 283, 291, 305-06, 319). During this time Detective Lewandowski asked appellant certain questions about his family and occupation for a lineup sheet; another detective, one McGroarty, typed up the sheet from appellant's answers (Tr. 254-55, 258, 274-75). Within five minutes of Delaney's return and between thirty to forty minutes of the time they entered the squad room, according to appellant, the detective again asked "had I ever had sexual relations with her and I said, Yes, sir, but I never used force or attempt." (Tr. 276, 293-95.) He claimed that the detective did not inquire about the night of December 18 in particular but rather merely whether appellant "had relations" with Miss

Elliott, to which appellant replied that he had, referring to some date in the past (Tr. 276, 284, 294-95). In contradiction to appellant's story, Delaney testified that when he returned to the room appellant was being questioned about whether *he*, *Delaney*, had also had relations with Miss Elliott, and that appellant said that Delaney had (Tr. 310-11). Subsequently, the two were taken down stairs and booked for rape, about 30 to 40 minutes of the time they entered the station and at about 1:15 a.m. (Tr. 255, 257-59, 277).

Appellant testified that he was never told, either while waiting for the patrol wagon or at the precinct, that he could leave if he wished (Tr. 271-72, 274), and he said that he did not feel, while in the squad room, that he was free to go (Tr. 289). On the other hand, he admitted that he had not been told by the officer at 14th and Girard or by anyone at the precinct that he was under arrest, and that he did not feel that he was under arrest until he was booked (Tr. 271-72, 280, 288). He testified that there was nothing to indicate that he was under arrest prior to the time he was booked except the fact that there were policemen around him (Tr. 288). He admitted that the policemen treated him "all right" (Tr. 288). He was born on December 3, 1945, went to the 11th grade in school and can read, and left school in 1962 to go to work in a restaurant (Tr. 270, 285). He said he had not been aware that it was a capital crime to have relations with a girl under the age of 16 even if she consented (Tr. 289).

At the conclusion of the hearing, after full oral argument (Tr. 409-23), the trial court found that appellant's admissions had been made within five minutes of the time he entered the squad room and therefore not during a period of illegal detention (Tr. 423-24). Since the *Mallory* rule was not applicable (Tr. 424), the admissions were received in evidence (See Counterstatement, *supra*, at 5).

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2801, provides:

Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be im-

prisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

Title 22, District of Columbia Code, Section 3501, provides in pertinent part:

(a) Any person who shall take, or attempt to take any immoral, improper, or indecent liberties with any child of either sex, under the age of sixteen years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child shall be imprisoned in a penitentiary, not more than ten years.

* * * * *

(c) Consent by a child to any act or conduct prescribed by subsection (a) or (b) shall not be a defense, nor shall lack of knowledge of the child's age be a defense.

Rule 5(a), Federal Rules of Criminal Procedure, provides in pertinent part:

* * * any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States.

SUMMARY OF ARGUMENT

Aware that the police wanted to question him about a rape complaint, appellant telephoned Detective Lewandowski and arranged to come to the station house to "straighten things out." He came down voluntarily, riding part of the way in a patrol wagon called at his own request by an officer on the beat. The trial court implicitly found that, under these circumstances, appellant was not under arrest until he arrived in the squad room at the precinct, when Detective Lewandowski, who had probable cause to arrest one Jerome Curtis for rape, determined that appellant was the Jerome Curtis concerned. Within five minutes of his arrival in the squad room, after having been advised of his right to remain silent, appellant confessed. This was a threshold confession properly admitted over a *Mallory* objection.

Under the circumstances described above, appellant was not denied his right to counsel merely because he was not advised that he might have assistance of counsel before he confessed. His confession so made was not involuntary.

I. Appellant's threshold confession, made within five minutes of the time he was effectively under arrest, was properly admitted in evidence

(Tr. 235, 236, 237, 246-47, 248-51, 265, 270, 271-72, 276, 280-81, 288, 309, 313-14, 401-08, 410, 423-24, 453).

After a lengthy hearing, the trial court ruled that appellant's statements to Detective Lewandowski at the 10th Precinct had not been made during a period of illegal detention and therefore were admissible in evidence (Tr. 423-24). The court stated that it believed the testimony of the detective and of Ulysses Delaney that the admissions were made within five minutes of appellant's entry into the squad room, "after a brief series of questions, which I consider to have been entirely reasonable and proper under the circumstances." (Tr. 424.) This ruling was clearly correct.

Under *Mallory v. United States*, 354 U.S. 449 (1957), statements made to the police during a period of unnecessary delay between arrest and arraignment, "of a nature to give opportu-

ity for the extraction of a confession,"⁸ are excluded from evidence. So-called threshold confessions, made shortly after arrest and before an unnecessary delay in arraignment has occurred, are admissible. *United States v. Mitchell*, 322 U.S. 65 (1944); *Ramey v. United States*, — U.S. App. D.C. —, 336 F. 2d 743, *cert. denied*, 379 U.S. 840 (1964); *Naples v. United States*, 113 U.S. App. D.C. 281, 283-84, 307 F. 2d 618, 620-21 (1962) (*en banc*); *Heideman v. United States*, 104 U.S. App. D.C. 128, 259 F. 2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959); *Metoyer v. United States*, 102 U.S. App. D.C. 62, 250 F. 2d 30 (1957). As this Court pointed out in *Scarbeck v. United States*, 115 U.S. App. D.C. 135, 152, 317 F. 2d 546, 563 (1962), *cert. denied*, 374 U.S. 856 (1963), "[a] period of unlawful detention cannot exist, of course, unless there has been an arrest or action amounting to arrest." It is thus necessary first to determine when appellant was effectively placed under arrest. After the time of arrest is fixed, the court should consider whether any delay in presentment in fact occurred between arrest and the making of the admission, and then whether any delay found to have occurred was unnecessary under the circumstances. Delay is not unnecessary where it has "some appropriate purpose * * * other than obtaining a confession." *Jones (David) v. United States*, D.C. Cir. Nos. 17688, 17690, decided July 16, 1964 (slip op. at 5) (*en banc*) (dictum).

In the instant case, it is clear that the trial court concluded that appellant had been arrested when he entered the squad room and not before (Tr. 424). Indeed, this is the only reasonable conclusion from the evidence adduced at the hearing. Cf. *Scarbeck v. United States*, *supra*, 115 U.S. App. D.C. at 151, 317 F. 2d at 562.

In determining when an arrest occurs, three factors must be considered: whether the subject is physically restrained, whether the police officers intend to restrain him, and whether the subject reasonably believes that he is under restraint. See *Henry v. United States*, 361 U.S. 98, 103 (1959); *Seals v. United States*, 117 U.S. App. D.C. 79, 81, 325 F. 2d 1006, 1008 (1963), *cert. denied*, 376 U.S. 964 (1964); *Coleman v. United States*,

⁸ *Mallory v. United States*, *supra*, 354 U.S. at 455.

111 U.S. App. D.C. 210, 218, 295 F. 2d 555, 563 (1961), *cert. denied*, 369 U.S. 813 (1962); *Kelley v. United States*, 111 U.S. App. D.C. 396, 398, 298 F. 2d 310, 312 (1961). None of these factors were present in the instant case until appellant appeared in the squad room. This is not a situation where police officers accost a subject on the street or in a building and request that he accompany them as in the *Henry*, *Seals*, and *Kelley* cases, *supra*. On the contrary, appellant, who had taken the initiative in arranging to come to the precinct, approached the policeman, to request a ride to the station. There is not a scintilla of evidence that the officer on the beat intended to arrest appellant⁹ or that appellant could not have walked off at any time before he entered the station, should such have been his desire. Finally, there is unequivocal testimony by appellant himself that no one told him he was under arrest at this point and, more important, that he did not consider himself under arrest until he was booked (Tr. 271-72, 280, 288). With these facts the trial court's implicit finding¹⁰ that appellant was not under arrest until he appeared in the squad room was the only reasonable conclusion.

Appellant's assertion in this Court that the arrest occurred at 14th and Girard is based solely on testimony that the lineup sheet, which is not in evidence, reflects that as the place of arrest (Br. 7, Tr. 247-48). However, this ignores the testimony of Detective Lewandowski that this statement on the lineup sheet, which was prepared by a detective who had not been at 14th

⁹ This officer knew only what appellant had told him—that someone had told appellant's mother that the police were looking for him for rape and that he should come up as soon as he could (Tr. 270). As Detective Lewandowski explained, this patrolman would have no reason to arrest a citizen who, in cold weather, asked for a ride to the police station where he had business to transact (Tr. 248-49).

¹⁰ The trial court's comments indicate that it was fully aware that *Mallory* operates to exclude only confessions made "during a period of illegal detention" and therefore that it must determine when the detention commenced (Tr. 265, 410). Therefore, when it ruled that the statement was admissible because

"* * * made by [appellant] within a period of not more than approximately five minutes after arriving at the station house * * *" (Tr. 424) the court obviously had concluded that appellant had been arrested when he arrived at the station house and not before.

and Girard, is incorrect (Tr. 248-49). This argument also ignores the practicalities of the situation and the testimony of appellant that he went to the station freely and voluntarily and did not consider himself under arrest until he was booked. This testimony by appellant (Tr. 280-81, 288) distinguishes this case from *Seals v. United States, supra*, where the defendant testified that he considered himself under arrest from the time the agents approached him in front of the school.

When appellant entered the squad room and identified himself to Detective Lewandowski as Jerome Curtis, who had been at 1359 Girard Street earlier in the evening, the detective had both probable cause to believe that a rape had been committed and probable cause to believe that the person before him had committed it.¹¹ Accordingly, we may conclude that from that moment, appellant was effectively under arrest. Detective Lewandowski then promptly advised appellant that he was charged with having raped Oleatha Peggy Elliott,¹² and appellant immediately stated that he had in fact had relations with the girl. The trial court accepted the testimony of the detective and of appellant's witness, Ulysses Delaney, that this admission was made within three to five minutes of the time they entered the squad room (Tr. 235, 246-47, 309, 313-14, 407-08), and rejected the testimony of appellant that he did not make such a statement until about 30 to 45 minutes after he went upstairs (Tr. 276).¹³

¹¹ At this time there was no lookout for appellant, although the detective did want to talk to him (Tr. 236, 237). Detective Lewandowski had talked to Peggy Elliott briefly at 1359 Girard Street, where she mentioned incoherently that "Jerome" had done something to her. However, at that time she was excited, complaining about pain, and crying, and it was not possible to interview her thoroughly (Tr. 247). In the presence of the jury, but not at the hearing, the detective testified in response to questions by appellant's counsel that after Miss Elliott was able to talk, sometime after 9 p.m. on the 18th, Detective Chase called him from D.C. General Hospital and gave him a full account of the girl's complaint (Tr. 453). When appellant arrived at the precinct, the detective knew that a serious charge was about to be placed against him (Tr. 249).

¹² The detective testified that he also informed appellant that he did not have to say anything and that anything he said would be used for or against him (Tr. 249-51).

¹³ Whether appellant referred to that night or to some time in the past is irrelevant for purposes of the *Mallory* issue: precisely what appellant said

While the police may not interrogate an accused at length with a view toward eliciting a confession, they may, and in fact should, ask him some questions. See, e.g., *Naples v. United States*, *supra*, 113 U.S. App. D.C. at 283-84, 307 F. 2d at 620-21; *Heideman v. United States*, *supra*, 104 U.S. App. D.C. at 130-31, 259 F. 2d at 945-46; *Metoyer v. United States*, *supra*.¹⁴ Appellant's admission was clearly threshold, as the trial court held (Tr. 424), and not the product of any sustained interrogation by police officers. It therefore was properly admitted in evidence. *Perry v. United States*, D.C. Cir. No. 18241, decided November 5, 1964; *Proctor v. United States*, — U.S. App. D.C. —, 338 F. 2d 533, *petition for cert. filed*, November 5, 1964; *Ramey v. United States*, *supra*; *Oliver v. United States*, — U.S. App. D.C. —, 335 F. 2d 724, 726-27, 727 n. 3 (1964); *Coor v. United States*, 117 U.S. App. D.C. 87, 325 F. 2d 1014 (1963); *Bailey v. United States*, 117 U.S. App. D.C. 241, 328 F. 2d 542, *cert. denied*, 377 U.S. 972 (1964); *Gardiner v. United States*, 116 U.S. App. D.C. 270, 323 F. 2d 275 (1963), *cert. denied*, 375 U.S. 976 (1964); *Muschette v. United States*, 116 U.S. App. D.C. 239, 322 F. 2d 989 (1963), *vacated and remanded on other grounds*, 378 U.S. 569 (1964); *Jackson v. United States*, 114 U.S. App. D.C. 181, 313 F. 2d 572 (1962); *Heideman v. United States*, *supra*. It is apparent from the testimony at the hearing that the questioning occurred *after* this statement and was directed toward eliciting information for use on the lineup sheet (Tr. 254-55, 258, 274-75). Delay between a confession and presentment does not render inadmissible a threshold admission. *United States v. Mitchell*, *supra*; *Bailey v. United States*, *supra* and cases cited.

Spriggs v. United States, — U.S. App. D.C. —, 335 F. 2d 283 (1964), relied on by appellant, is not in point. There,

was a question of fact for the jury. What is important here is that some statement to the effect that appellant had had relations with the girl was made within five minutes of his entry into the room—on this the detective and Delaney were agreed.

¹⁴ Appellant's trial counsel agreed with the court that it is entirely proper for police officers to "make reasonable inquiry in order to ascertain whether, in his judgment, there should be anything further in the way of a proceeding with reference to the charge that is made * * * to inquire of the defendant as to whether or not he was connected with this particular affair to afford him an opportunity to explain his way out of it if he can" (Tr. 413).

the confession was made after the defendant had been booked and during an apparently lengthy period of form-completion. The court noted that it could not determine "with accuracy" the sequence of events at the station, and that the defendant had twice refused to say anything to the officer. The sequence of events in the instant case is clear¹⁵—appellant immediately confessed when told that he was accused of rape. The court in *Spriggs* recognized that spontaneous confessions do not fall within the prohibitions of *Mallory*, but held that the confession in that case had not been spontaneously made, but rather was the product of secret interrogation. The admission in this case can hardly be characterized as the product of condemned interrogation.

II. Appellant's voluntary threshold confession was not the product of a denial of his right to counsel

(Tr. 268, 271-74, 276, 277, 410-26, 420, 422, 425, 557-59, 574, 580)

Appellant argues that his statements to Detective Lewandowski on the early morning of December 19 should not have been admitted in evidence because he had not been previously advised of his right to counsel. In addition to claiming that this violated his Sixth Amendment right,¹⁶ appellant also apparently contends that the absence of counsel at this time rendered his admissions involuntary as a matter of law under the Fifth Amendment.

No case has yet held that the absence of counsel alone vitiates a confession whatever the other circumstances. Twice in recent months this Court has declined to adopt such a rule for

¹⁵ Appellant's time sequence is inherently impossible; he testified that the wagon came at about 11:45, that the journey to the precinct took about 7 minutes, that they waited down stairs between five and eight minutes, and that the questioning upstairs took between 30 and 45 minutes (Tr. 271-74). This would place his admission at 12:45 a.m. at the latest. However, he claimed that it was made about an hour and a half after the wagon picked him up (Tr. 276), which would be at 1:15. He claimed he was booked after making this statement (Tr. 277), and the evidence shows that he was indeed booked at 1:15. Under the first calculation *supra* his admission came at 12:45, which is precisely the time testified to by Detective Lewandowski and Ulysses Delaney.

¹⁶ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

this Circuit and has rejected the argument that *Escobedo v. Illinois*, 378 U.S. 478 (1964) should be read this broadly. *Long v. United States*, — U.S. App. D.C. —, 338 F. 2d 549 (1964); *Jackson v. United States*, — U.S. App. D.C. —, 337 F. 2d 136, *petition for cert. filed*, November 5, 1964. The *Long* case involved a statement made by a person under arrest, apparently after he had been booked but at least in part before he had been advised by anyone of his right to remain silent. In *Jackson*, the accused had been arrested and advised of his rights by a United States Commissioner pursuant to the provisions of Rule 5(a) of the Federal Rules of Criminal Procedure. In both cases the challenged admissions were made spontaneously; there was no evidence of sustained interrogation.

In the instant case, appellant's admissions were made within five minutes of his arrival in the squad room and before any prolonged interrogation occurred. There is testimony that before he confessed he had been advised of his right to remain silent and that anything he said would be used for or against him (Tr. 249-51, 429, 441, 456, 465-66). He had not been denied assistance of counsel and had not yet been booked. In these circumstances, *Escobedo v. Illinois*, *supra*, is distinguishable and *Long* and *Jackson* cases, *supra*, are controlling. Appellant's admissions were properly admitted in evidence.¹⁷

¹⁷ Finally, appellant suggests that the decision in *Jackson v. Denno*, 378 U.S. 368 (1964), which was subsequent to the trial in this case, requires reversal, since the trial judge did not make a specific finding that the admissions were voluntary before he submitted them to the jury.

At first, appellant's trial counsel disclaimed any intention of arguing that the admissions made to Detective Lewandowski were involuntary. He plainly stated that he would object to the statements only on *Mallory* grounds and on the ground that they were made without advice of counsel. (Tr. 268.) At the conclusion of the hearing, arguing against admissibility, counsel reviewed testimony indicating that appellant was either 18 or 19 years old, that he was unaware that he would be charged with a capital offense, that the detective was a skilled police officer familiar with the *Mallory* rule and aware that it was a capital case, and that there was a conflict in the testimony as to whether appellant had been warned of his rights. Counsel then agreed with the court that this evidence would be relevant to the question whether the confession was voluntarily made, al-

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed, or in the alternative, that the cause should be remanded for appropriate proceedings.

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though he said he would not suggest that physical coercion was used. (Tr. 410.)

After a full discussion of the *Mallory* rule, the applicable pre-*Jackson v. Denno* legal standards, and the facts adduced at the hearing (Tr. 410-28), government counsel agreed that the issue of voluntariness should be submitted to the jury (Tr. 420, 422). The court then found that "there [was] ample evidence upon which the jury might, if they see fit to do so, conclude that the statement was voluntarily made * * *" (Tr. 425). Consequently, the court charged the jury, without objection, on the standards it should apply in determining whether or not to consider as evidence the testimony regarding appellant's admissions (Tr. 557-59, 574, 580).

We submit that there is not a scintilla of evidence in the record that appellant's admissions were involuntary. Appellant does not suggest what factors he contends indicate involuntariness. Accordingly, appellant received more than he was entitled to when the trial judge submitted the issue of voluntariness to the jury, and appellant should not be heard to complain that the procedure alone compels reversal.

If this Court should conclude that some evidence of involuntariness does exist in the record, there would be no need to reverse the conviction. Cf. *Jackson v. Denno, supra*, 378 U.S. at 394. A full hearing was held outside the presence of the jury, which developed the facts surrounding the making of the admissions. The case should be remanded to the trial court to determine whether in its opinion the admissions were voluntary. If the trial court found the admissions voluntary, then they were properly admitted under *Jackson v. Denno*. If the court does not make such a finding, of course, a new trial would be required.

